

Good Government and Regulatory Quality Yearbook 2023 on behavioural insights and nudging, published in 2024

Executive summary¹

The Yearbook of Good Governance and Regulatory Quality is an annual publication of the Fundación Democracia y Gobierno Local, with the collaboration of the Federation of Municipalities of Catalonia and the support of the National Market and Competition Commission (Comisión Nacional del Mercado y de la Competencia), which analyses each year, with the participation of renowned experts from different disciplines (Law, Economics, Public Management, Political Science...), the main issues related to good government and good administration.

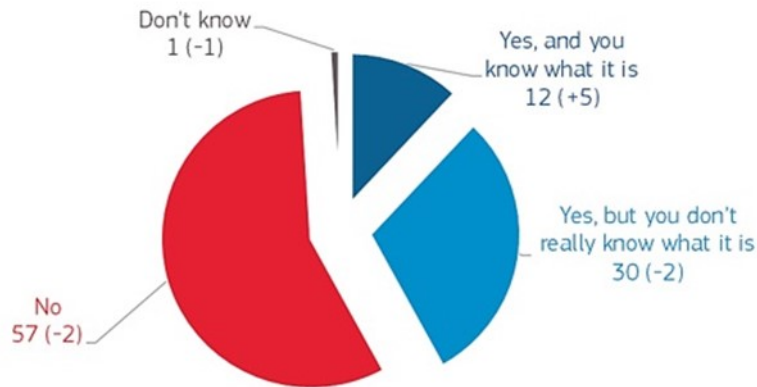
The Yearbook is prepared with the prior holding of a Living Lab, that is, a methodology to innovate in social challenges in a collaborative way, to share information and experiences. This method provides more creative contexts, with horizontality and empathy; more representative, as the participating community (which goes beyond the purely academic) is articulated according to the challenge to be solved and seeks experimentation and co-creation.

The Yearbook addresses topics such as the quality of regulation, the protection of whistleblowers, the impact of behavioural sciences on public management, conflicts of interest, codes of ethics or conduct, artificial intelligence, corruption prevention, the evaluation of public policies and the role of lobbies, among others. These issues are dealt with from an academic and practical management perspective, with analysis of relevant national and international documents and the development of models of management instruments that may be useful, with a special focus on the local level.

As is well known, in addition to Spanish legal norms and jurisprudence, the right to good administration is recognised in the Charter of Fundamental Rights of the European Union - approved in 2000 and incorporated into the Treaty on European Union (Treaty of Lisbon) of 13 December 2007, ratified by Instrument of 26 December 2008, in its article 6 - and is very frequently applied by the European Court of Human Rights. The European Commission published in 2019 a Eurobarometer survey on citizens' awareness of the Charter. According to the survey, although the situation has improved slightly since 2012, only 42% of respondents had heard of the Charter and only 12% were aware of its content.

¹ Translated from the Spanish version using DeepL.

QB1 Have you ever heard of the Charter of Fundamental Rights of the EU?
(% - EU)



(March 2019 - June 2012)

The results also show that six out of ten respondents would like to have more information about the Charter and where to turn if their rights are violated.

Finally, the importance of good governance has recently been highlighted again by the 2023 study on good governance in European states, promoted by the Swedish government.

In this context, the Yearbook of Good Governance and Regulatory Quality 2023, published in 2024 and directed by Professors Ponce (UB) and Villoria (URJC) and coordinated by Prof. Capdeferro (UB), is devoted in large part, although not exclusively, to Nudges (*acicates* in Spanish) and behavioural contributions to improving the decisions of the executive power, with special attention to the local world, because it is a subject little studied in Spain and in need of analysis due to its growing application in practice.

The original English expressions "nudging" and "nudge" are used in the text. The Spanish translation recommended by the Fundación del Español Urgente (FUNDÉU RAE, advised by the Real Academia Española and promoted by the EFE Agency and the BBVA bank) is "acicate", which is defined as "incentive" or "stimulus", which can be an alternative to "nudge" when used as a noun (see FUNDÉU RAE, Acicate, alternativa a nudge, (10 Oct. 2017) Buscador urgente de dudas, available at: <https://www.fundeu.es/recomendacion/acicate-alternativa-a-nudge/>).

In accordance with the contributions from the so-called behavioural sciences or sciences of human behaviour, above all from psychology - with the well-known work of Kahneman, Nobel Prize in Economics in 2002, who died in March 2024 and to whom this Yearbook is dedicated - and from Economics - with several Nobel Prizes in recent years in relation to the so-called behavioural economics, among them Richard H. Thaler in 2017 - we have now reached a point where it is widely accepted that the absolute rationality of the individual, that of homo economicus, does not exist, since, first and foremost and for what concerns us now, it is limited and because, moreover, this conception of the human being does not take into account perfectly rational behaviours such as reciprocity and altruism.

Moreover, such rationality is interfered with by heuristics and biases. As a result, our brains deceive us, not infrequently. Scientific advances show that people are not perfect decision-makers who maximise our interest with absolute rationality. Deviations from

people's rationality are already well studied, as heuristics generate systematic and predictable errors: cognitive biases. The automatic system of thought (or system 1, in Kahneman's terminology, as opposed to the more calm and rational system 2) gives rise to them.

These scientific developments are relevant to the social sciences in general. In particular, nowadays we are already talking about behavioural economics and law, since the sciences of human behaviour have been questioning the homo economicus model of classical economics for years.

It is from the aforementioned scientific contributions that the notion of nudging and nudge (which can be translated as incentive) arose, which is widely used in the private sector, and not always for laudable purposes, and which has inspired specific public regulatory policies in different countries around the world, and to which the former US President Obama devoted attention during his term of office with two executive orders he issued on this issue. The concept has also given rise to specific organisational structures to promote these initiatives (as in the notorious case of the British Behavioural Insights Team, which has been working for a decade now) and reports by the European Union.

From a purely linguistic perspective, nudging in English would mean gently nudging or tapping the ribs, especially with the elbow, in order to warn, remind or gently admonish another. In their seminal work on the subject, published more than a decade ago (and translated into Spanish and published by Taurus publishing house, which has already seen a second edition in 2021 in English) R. H. Thaler and Cass Sunstein (American jurist and manager on regulatory improvement issues in the Obama Administration) define nudging in the field of public policy as:

"any aspect of the decision architecture that modifies people's behaviour in a predictable way without prohibiting any choice or significantly changing their economic incentives". To qualify as a nudge, it must be cheap and easy to avoid. Nudges are not commands".

Examples of nudges can be:

-Default choices (which can be used, for example, in favour of the decision to donate organs or in favour of default savings for retirement).

-Information obligations incumbent on private companies to guide consumer activity (e.g. with regard to the impact of their activity on the environment, as in the case of car manufacturers)

-Provision of information by the administration itself (on tax compliance or other behaviour of fellow citizens). One example, among others, is the case of the municipality of San Marcos, in California, USA, which, by using a nudge, managed to alter the behaviour of its citizens: those who consumed more than the average reduced their consumption. This was achieved by informing residents of their city's average energy consumption and accompanying the information with an emoticon, i.e. a non-verbal signal, with a happy or sad face, depending on individual consumption (see: [Energy Use Study Demonstrates Power of Social Norms – Association for Psychological Science – APS](#)).

This type of administrative intervention, sometimes referred to as "libertarian paternalism", a somewhat confusing expression that would perhaps be better replaced by liberal intervention, appears to be of interest in the practical future in our own context for improving governance and administration.

Of course, nudges and behavioural inputs connect, as we said, to the concepts of good governance, good government and good administration.

Although this perspective appears promising for achieving a simpler, more efficient and effective administrative activity in the service of general interests, more research is needed in the future, considering the criticisms that nudging has raised in relation to its impact on citizens' rights - as it may be a kind of manipulation of these - its negative derivations - such as the so-called sludge or dark patterns - as well as its effective legal control, judicial if necessary, to guarantee them.

2. Structure of the Yearbook

With this conceptual framework in mind, the Yearbook includes, first of all, various doctrinal studies by renowned specialists. Firstly, as usual, there is Professor Andry Matilla's cross-cutting analysis of the legal concept of good administration.

In the second section of this Yearbook, devoted to studies on behavioural contributions and nudges, we have four studies by Professor Rivero, Professors Noguera and De Quintana, Gaviño and Cuevas of BBVA and González, Tarrega, Vela and Bisharat of the CNMC. They analyse relevant issues such as the concept of boosting or cognitive empowerment, the concept of non take up or the impossibility of receiving the benefits to which one is entitled due to the presence of administrative sludge, the importance of behavioural contributions for the defence of competition and consumers, and the BELA experience in the banking sector, respectively.

In the section on specific practices, Professor Elisa Moreu Carbonell analyses various specific local experiences in the use of behavioural contributions and nudges, paying special attention to so-called tactical urban planning and the case of the "superilles" or superblocks in Barcelona.

The Yearbook closes with the usual sections on good administration and good governance in general of documents of interest, selected and annotated international and national jurisprudence, and selected and annotated relevant bibliography.

3. Conclusions, Proposals and Recommendations

In view of the previous Living Lab held in November 2023 and the analyses included in this 2023 Yearbook, the following conclusions can be highlighted here (a total of 8) which, in turn, imply proposals and recommendations for regulators and public managers (a total of 5):

Conclusions:

1. The use of behavioural inputs to improve administrative decisions is not a passing fad. It is a perspective based on solid empirical analysis, supported by several Nobel laureates in economics in recent decades and used by public authorities and regulators, with notable examples at the local level, all over the world, as well as by private companies.

2. Behavioural inputs have nudges as one of their star instruments. However, it is not the only one. Cognitive boosting is another useful tool, which can and should be combined with nudges and commands and prohibitions. It targets people's cognitive and

motivational competencies with the aim of allowing individuals the autonomy to make their own decisions, as they equip us with the tools to do so for ourselves and on our own terms. They are designed to enable people to take advantage of long-term learning, empowering individuals to change or adopt behaviours by improving their decision-making capabilities. When boosting is removed, behaviour usually returns to the state prior to the intervention. When boosting is removed, it is likely that the individual has already learned how to apply the teaching and will continue to apply it as their competencies have expanded to include this new learning.

There is no one-size-fits-all solution: the public decision-maker must consider the specific circumstances and employ some, several or all of these techniques, which are complementary, not mutually exclusive.

The incentives are effective (art. 103. 1 Spanish constitution, SC) and economical (art. 31.2 SC) to achieve general interest objectives on certain occasions. Although they have been criticised in various ways, most notably for possible manipulation, they have so far been soundly answered by behavioural specialists (PONCE, 2022 and in [\[REPOST: RedNMR\] Publication of the book "Nudge. The Final Edition" - JULI PONCE SOLÉ | Jean Monnet Chair on Better Regulation \(lumsa.it\)](#)).

3. With regard to the aforementioned manipulation, it is true that the risk exists, especially in the digital sphere, where dark patterns, now prohibited by EU law, can lead to private companies taking advantage of consumers' cognitive biases to the detriment of consumers and competition. In the face of the risks of manipulation, Sunstein (2015) proposes placing the emphasis on the well-being, autonomy and dignity of the individual when designing them.

4. The future of nudges seems to be linked to their joint use with artificial intelligence (so-called hypernudging) allowing for a positive personalisation of public services for users and of private companies' products and services for consumers. The example of BELA in banking is interesting in this respect. However, the aforementioned risks of exploiting user and consumer biases are also present, perhaps especially in this possible use of tools, algorithms and big data.

5. Although Spain lags behind neighbouring European countries, there are interesting experiences at the local level in Spain, in various fields including urban planning and mobility, among others.

6. In the field of promoting competition and consumer protection, knowledge of behavioural contributions by regulatory bodies appears to be of great importance, and the UK and Chile, for example, are working along these lines. In the case of Spain, the CNMC has announced the drafting of a specific report on this issue.

7. In the case of the fight against poverty within the framework of the welfare state, behavioural contributions and experiences from other countries can help us to improve existing regulations. Modifying the architecture of the choice of applicants for these benefits can be particularly beneficial. Sludges, or administrative hurdles, feature in much of our interactions with the public sector. However, in the design of social policies they are of particular importance, giving rise to the non-perception of rights or the non take-up, i.e. the difference between theoretically recognised rights and reality. This non-receipt or even the delay in the granting of aid derived from the verification of the requirements, or the impossibility of obtaining it due to administrative bureaucracy, causes damage to the people who depend on them for subsistence, which should also be taken into account in this cost-benefit analysis that should be carried out in the rules

that design the administrative processing system and which has not been done so far. It is therefore necessary to work to ensure that the social welfare state has simplification techniques that are at least similar to those already applied to the development of private economic activity.

The presumption that vulnerable families can make fraudulent use of benefits, as opposed to an employer, is a possible moral prejudice that can be found in the current flawed design of many of the processes for claiming social benefits and allowances. But it is literally a bias. The available evidence seems to validate this alternative, disproving the presence of widespread fraud in this field (Ranchordás and Schuurmans, 2020). Only a small minority of welfare recipients abuse the system: between 2% and 10%, in fact, according to studies in countries such as the United States, the United Kingdom and the Netherlands. On the other hand, the public expenditure generated by the processing of applications, in terms of public employees used and their salary, if this task is not outsourced with the corresponding public expenditure, is likely to exceed this alleged fraud.

In other words, the challenges arising from the accreditation of requirements show that there is great room for improvement in a relevant area, where several constitutional and statutory rights are involved (right to life and to physical and psychological integrity, right to housing, right to good administration, etc.). This improvement should be developed, firstly, when it comes to respecting the right not to ask for documentation that the administration can obtain with its own means, as provided for in the legislation. Secondly, by offering forms of accreditation that are more flexible to the particularities of each case. And thirdly, by expanding the use of responsible declarations, as in the case of economic activity, in order to reduce the administrative burden on applicants and speed up the payment of aid. A system could be chosen, as is already in place for certain economic activities, whereby a responsible declaration replaces the presentation and verification of requirements for applying for a benefit, checking, once the aid has been granted, whether the beneficiaries meet the criteria. As is well known, the 2006 Services Directive, in the field of economic activities, has led to a trend towards the elimination of the need to apply for licences and administrative authorisations and their replacement by prior communications and responsible declarations. This change has come about as a result of EU law and in protection of the freedom to provide services.

It is important to initiate a regulatory movement in the social sphere similar to that carried out in economic activity. In other words, it is necessary to consider, in view of what is happening, moving from the current system of a necessary application by the person in need and waiting for an administrative decision, to a system in which there could be a responsible declaration of compliance with the requirements, which would lead to the automatic granting of the benefit, without prejudice to the fact that the Administration, a posteriori, could carry out checks and react in those cases in which they demonstrate the inadequacy of the decision adopted.

In this sense, therefore, it would be necessary for the rules to evolve in the future towards replacing applications with ex officio initiation using data already held by the administration. However, if the need for the interested party to approach the administration for the aid is maintained, then the application would have to be replaced by a declaration of responsibility or similar document that would allow the aid to be paid as quickly as possible, without prejudice to the subsequent administrative verification. This system could be complemented by using the contributions of behavioural ethics, which has shown that having people sign a carefully worded statement on the honesty of their responsible declaration helps to reduce falsehoods and inaccuracies (PONCE,

2021). This is without prejudice to the fact that, if these occur, they are typified, as they already are, as administrative infractions or even criminal offences. The model of responsible declaration could be a useful reminder of this.

8. Finally, all of the above leads to the need to integrate behavioural contributions and the use of incentives in private and public activity from a transdisciplinary perspective. Along these lines, in the field of behavioural law, for example, ULEN (2015), among others, has highlighted the need to incorporate the relevance of transdisciplinarity for the resolution of complex problems, which therefore presupposes the necessary humility of the different specialists to be able to enter into a fruitful dialogue with other specialities, which, as in the case of law, cannot be ignored or relegated.

Proposals and Recommendations:

1. The integration of behavioural inputs into administrative decision-making and the use of nudges should be pursued. This could be done in several areas, among which the following can be highlighted (PONCE, 2022 a):

a. Improving the quality of administrative regulation (by means of specific analyses incorporated into impact assessments and by means of techniques focused on improving regulation) linked to the international movement for better regulation, which avoids administrative sludge, with special attention to the social benefits that are vital for people in our rule of law in order to avoid the impossibility of receiving the benefits to which they are entitled.

b. The intelligent use of active advertising by administrations within the framework of transparency legislation. In this way, active publicity ceases to be a simple, albeit important, element of transparency and becomes a public policy in itself, a public policy that seeks to guide the activity of the private sector and citizens in carrying out activities of general interest.

c. The prevention of corruption in the administration and the promotion of the right to good administration through the design of adequate administrative institutions (in terms of organisation, civil service and decision-making mechanisms), as highlighted by the OECD.

d. Effective and economic public intervention in the conduct of the private sector in markets, as a guarantor of the general interest, which has so far been the main focus of attention in the area of incentives. In this area, the possibilities for competition and consumer protection through the use of these perspectives, in combination with the regulation referred to in point a, are a specific area of great interest to be developed.

2. Creation of behavioural units in Spanish public administrations, following the path taken internationally, which has led to the creation of several hundred such units.

The French example presented at the living lab in November 2024 which prepared the Yearbook is interesting in this respect. It was attended by Ms. Mariam Chammat, Project Manager of the Behavioural Sciences team at the Interministerial Directorate for Public

Transformation (DITP) within the French Ministry of Public Transformation and the Civil Service. Chammat holds a PhD in Cognitive Neuroscience from Pierre and Marie Curie University. In 2015, she co-founded Chiasma, a company that aims to translate findings on reasoning (from cognitive science research) into techniques that people can practice and use in their own lives.

In his presentation, Chammat explained how the French government's behavioural team started years ago with a budget of one million euros to develop fifteen projects and has now reached four million euros to develop 30 projects, which is a good indication of its effectiveness and efficiency. During her presentation, the speaker explained some of these projects to improve public administration in France, including local authorities, in various fields, projects that are easy to consult on their website.

Based on the already consolidated French experience, Ms. Chammat offered some recommendations on the best organisational design for future behavioural units to be implemented in Spain, following in the footsteps of the more than 200 already set up in neighbouring countries:

1. Relying on the work of the OECD in this respect and its advice to member countries.
 2. Proceed to select the initial behavioural projects of the units with the criterion of obtaining the greatest possible return in order to convince elected and senior officials of the usefulness of the behavioural approach. A recommendable initial area could be taxation, acting on the increase in the voluntary payment of taxes by citizens, in the wake already initiated by other behavioural units.
 3. Establish close collaboration with universities and academics specialising in the subject, as well as with the private and third sectors.
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3. Integrate into the control of administrative decisions, and in particular the consideration of alternatives, the handling of behavioural inputs, in accordance with the principle of proportionality and the principle/right to good administration.

As is well known, according to the principle of proportionality, any public decision must respect three filters: the decision, in addition to seeking the general interest (appropriateness) and providing benefits that outweigh the costs (proportionality in the strict sense), it is essential that it passes the necessity test. In order to pass this third filter, when pursuing the general interest, it is necessary that the public decision chooses the alternative that has the least impact on human rights, i.e. the least burdensome.

This sub-principle implies that decision-makers must take into consideration various alternatives, since they must weigh the relevant elements in the decision-making procedure - as required by the obligation to consider them with due diligence and due care inherent to the principle/right to good administration - in order to choose the one that is the least burdensome for the citizenry.

Our legal system explicitly establishes these two obligations, derived, respectively, from the principle/right to good administration - which has been considered by the CJEU in thousands of judgments as one of the constitutional traditions of the EU Member States, now enshrined in art. 41 of the Charter of Fundamental Rights of the European Union, implicitly in our Constitution as a principle, in accordance with the Spanish Supreme

Court and explicitly in various Statutes of Autonomy and different legislation as a right - and of the principle of proportionality, in accordance in this second case also with abundant case law of the CJEU and the SC.

Consequently, it can be argued that if, after a diligent consideration of alternatives, the incentives are less invasive to the original freedom of citizens than legal limitations or prohibitions and are at least as effective as the latter, an aspect that will have to be proven, then the principle of proportionality would impose the use of incentives.

It is precisely here that we find ourselves faced with one of the so-called bridging concepts, that of effectiveness, which makes it possible to link law with other disciplines (sociology, political science, economics, etc.): faced with two measures to be adopted, how could an administrative decision-maker know the effectiveness of one or the other if not on the basis of the evidence available or to be generated?

In short, if there is a nudge that can be used, decision-makers should, at the very least, carefully consider its possible use with due diligence in line with their duty of good administration and, where appropriate, justify and give reasons for discarding it in order to avoid violating the principle of proportionality.

1. Provide training for senior officials and public employees on what behavioural inputs mean and how incentives can be used in the development of public policy. In this regard, the role of Schools and Institutes of Public Administration seems crucial in providing training to improve the quality of government and administration.

This training is linked to the fight against cognitive biases and the promotion of boosting (cognitive empowerment) beyond the specific incentives, as discussed above. However, there are other more sceptical approaches, including, incidentally, that of the UK Behavioural Insight Team, which has indicated that it finds no conclusive evidence of the effects of this training and recommends other strategies, which has led to the suspension of this type of training in the UK public administration, following a government statement at the end of 2020. All of this is in line with what had been done months earlier in the US by then President Trump. These decisions have, in turn, generated controversy on the issue.

In any case, specialists in the field point to studies that demonstrate the positive impact of this type of training on the detection and avoidance of bias (FELDMAN, 2018, pp. 90 and 99). Furthermore, available studies in the field of behavioural ethics show how training can be effective if it is concrete, practical and focused on resolving issues that are not clearly resolved by the applicable regulations (CAPDEFERRO and PONCE, 2022).

2. Generate more behavioural science and experimental laboratories in universities in order to provide empirical evidence on the usefulness of different nudges and to help innovate in this field.

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